SUPREME COURT OF THE UNITED STATES.

Nos. 59 and 60.—October Term, 1925.

Gulf Refining Company of Louisiana, B. R. Norvell, A. E. Weaver, et al., Appellants, vs. The United States of America.	Appeals from the United States Circuit Court of Appeals for the Fifth Circuit.
Mrs. Lydia Hanszen McMullen, H. Earl Barnes, Dillard P. Eubank et al., Appellants, vs. The United States of America.	

[November 16, 1925.]

Mr. Justice Sutherland delivered the opinion of the Court.

These are second appeals of two of the cases which were before this court in *Mason* v. *United States*, 260 U. S. 545. The suits were brought by the United States to have its title to certain tracts of land confirmed, its possession thereof restored, and defendants enjoined from setting up claims thereto, etc. In addition, the government prayed for an accounting in respect of the oil and gas removed from the lands by the defendants. We held that the suits primarily involved the question of title to the lands and their protection against continuing trespasses, to which the accounting was incidental and dependent; and that the causes of action being, therefore, essentially local, the measure of damages to be allowed on the accounting came within the controlling scope of Article 501 of the Civil Code of Louisiana, under which the cost of production must be first deducted from the value of the oil produced even though the defendants went into possession in technical bad faith but in moral good faith.

The cases were referred to a master, who found the primary issues in favor of the government and made an accounting up to January 1, 1918. At that time, the cost of drilling, equipping and operating the wells, through and by means of which the

oil was extracted, greatly exceeded the value of the oil produced, and, in accordance with the Louisiana rule, no recovery on the accounting was allowed by the master or the trial court, except in a particular not affected by the rule. The decree in each case was for the government and contained the following clause:

"That the defendants be and they are hereby ordered, directed and required to make a full, true and accurate accounting to plaintiff of all oil extracted from said land since January 1, 1918, and to pay to plaintiff the value thereof, as ascertained by said accounting, together with all rents and royalties derived therefrom, and that all of plaintiff's rights to recover the oil produced from said land by the defendants since January 1, 1918, be reserved."

Following the decision of this court, a stipulation was submitted to the trial court, by which it was agreed that a decree should be entered against each of the defendants for a stated sum, if "the court should hold that plaintiff is entitled to recover the net value of the oil produced after January 1, 1918." It was further stipulated that the total value of all the oil produced from the beginning of operations until the abandonment of the wells was less in each case than the cost of production, that is to say, that the entire operations of each defendant in the production of oil were conducted at a loss, the profit after January 1, 1918, not being sufficient to offset the loss incurred in the production of oil prior to January 1, 1918. Upon the strength of the latter stipulation the trial court held that the government was not entitled to recover anything. The circuit court of appeals reversed the trial court, holding that defendants were not entitled to offset any part of the cost of production prior to January 1, 1918, against the value of the oil produced after that date. 298 Fed. Rep. 281.

The government first contends that the decrees are not final and that the appeals should be dismissed because the court of appeals remanded the cases "for further proceedings not inconsistent with the opinion of this court." The general rule established by many decisions, of which *Haseltine* v. *Cent. Bk. of Springfield* (No. 1), 183 U. S. 130, is an example, is that the face of the judgment is the test of its finality and that by this test a judgment of reversal remanding the cause for further proceedings in conformity with the opinion of the court ordinarily is not final. But the direction to proceed consistently with the opinion of the court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length. *Metropolitan Co.* v. *Kaw Valley*

District, 223 U. S. 519, 523. Under the stipulations above recited, the trial court was bound to enter decrees for the government for the stated sums of money if that court found that the government was entitled to recover the net value of the oil produced. The trial court found that the government was not so entitled and the decrees went accordingly. Turning to the opinion, it will be seen that the circuit court of appeals decided that the trial court erred "in entering the decrees denying the complainant the right to recover the net value of the oil, etc." The instruction for further proceedings not inconsistent with the opinion, therefore, was equivalent to a direction to render judgment for the net value—that is, for the exact sums set forth in the stipulations. See *Moody* v. *Century Bank*, 239 U. S. 374, 376; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 241. There was no evidence to be taken or considered, and no change in the issue was possible: nothing remained but the ministerial duty of entering a decree for the precise sums which had been fixed beyond the power of alteration. It follows that the jurisdictional objection is without merit.

The original decrees of the trial court, rendered August 12, 1919, confirmed the accounting to January 1, 1918. But defendants had operated the properties during the pendency of the suit and they were ordered to make a further accounting of oil extracted after that date. The decrees, however, were final for purposes of the original appeals to this court, since they decided the title to the properties, ordered their delivery to the plaintiff, and enjoined further trespasses upon them, jurisdiction being retained merely of so much of the decrees as might be necessary to carry them into execution by compelling an additional accounting in respect of oil extracted *pendente lite*. *Mo. Kansas & Texas R. R. Co.* v. *Dinsmore*, 108 U. S. 30; *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180, 183; *Forgay et al.* v. *Conrad*, 6 How. 201, 204; *Thomson* v. *Dean*, 7 Wall. 342, 345.

The decision of the circuit court of appeals seems to have proceeded from the standpoint that one who continues in possession of lands, originally taken in good faith, after judgment against him, may not have the advantage of the good faith of his original entry to enable him to offset his expenditures against the value of the oil extracted after judgment pending proceedings on appeal. Whether, thus stated, this is an accurate view of the law we need not stop to inquire, since we are not here dealing with the common

law doctrine in respect of trespassers in good faith but with the case of persons who knew all the facts from the beginning and who in the light of those facts upon common law principles were possessors in legal bad faith but in moral good faith. The adjudication of the trial court added nothing to their knowledge of these facts. It simply informed them that the conclusion in respect of their rights which they had drawn from the facts was erroneous, a conclusion with the knowledge of which they must be charged from the beginning, since, legally though not morally, they were conclusively bound to know the law even before it had been declared by the court. The *moral* quality of their possession was not affected by the institution of the government's suit or the resistance which they interposed before judgment to the government's contentions. And how can it be said that the moral quality of that possession was altered by the entry of the decrees? for *non constat* that they would not turn out on appeal to be wrong. An appeal is not a new suit in the appellate court, but a continuation of the suit in the court below, or, as this court has recently said, "a proceeding in the original cause and the suit is pending until the appeal is disposed of." *Mackenzie* v. *Engelhard Co.*, 266 U. S. 131, 142-143. It is but a step toward the final adjudication of the original cause which the law allows quite as much as it allows a defense in the first instance. We are of opinion that within the principle of the Louisiana rule the defendants continued in possession in moral good faith until the final adjudication upon appeal.

But it is said further that the accounting for oil produced after January 1, 1918, must be kept entirely separate and distinct from the operations prior to that date, because they had been concluded and finally adjusted by the previous accounting; and that, therefore, the costs incurred prior to January 1, 1918, were not to be considered in determining the offset against the value of the oil produced after that date. To this we cannot agree. The possession of the defendants was continuous. Its character after January 1, 1918, was the same as it had been before. The limitation of time over which the first accounting extended was purely adventitious. It as well might have been for a shorter or for a longer period. So far as the accounting was concerned, the effect of the decrees was to fix the principles, approve the master's report of a partial accounting, and direct a completion of it, retaining juris-

diction over the decrees only so far as might be necessary to that end.

If the production costs had been less than, or equal to, the value of the oil extracted prior to January 1, 1918, they would have been absorbed as credits. But they exceeded this value, and it was impossible on the first accounting to give defendants the benefit of the excess, since such costs could be utilized only by way of recoupment and not as the basis of an independent claim. The two accountings, it is true, were separate, but the separation was purely artificial. In substance, the latter was a continuation of the former, and, since the excess costs could not, and, therefore, did not, enter into the preliminary accounting, we see nothing in the mere form of the proceedings which should stand in the way of the excess being allowed in the final accounting where the circumstances were so far changed as to furnish a proper basis for allowing it as a further credit. The direction for the final accounting was interlocutory and incidental to the main decrees, made for the purpose of carrying them into effect, and, hence, left the matter to which the direction related open to change and adjustment by the trial court and, upon its final disposition there, subject to separate appellate review. See *Forgay et al.* v. *Conrad, supra,* pp. 205-206; *Adams* v. *Sayre,* 76 Ala. 509.

There remains to be considered a matter of costs in No. 59. By the original decree in that cause, defendants were ordered to pay the aggregate sum of $4,000 for royalties received from the Gulf Refining Company by the other defendants. This amount, together with interest, was paid to the clerk in satisfaction. That officer demanded a commission of one per cent. under § 828 R. S., which provides: "For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid." The trial court, upon a rule to show cause why the commission should not be paid as part of the costs, entered an order disallowing the item, which order was reversed by the court of appeals. We are satisfied with the reasoning and decision of the appellate court which follows its previous decision in *United States* v. *Hunsicker,* 298 Fed. 278. See also *United States* v. *Pennsylvania R. Co.,* 283 Fed. 937; *Blake* v. *Hawkins,* 19 Fed. 204. The point is made that after the passage of the statute placing

clerks of court on a salary basis (c. 49, 40 Stat. 1182, amended c. 46, 41 Stat. 1099) the commission was not a proper item of taxable costs, and that since the government is not obligated for the one per cent., it cannot recover. The salary act provides that "all fees and emoluments authorized by law to be paid to the clerks . . . shall be charged as heretofore, . . . collected . . . and paid into the Treasury of the United States." The effect of this is to leave the matter of the taxability of clerk's charges where it was. The government pays the salaries and steps into the shoes of the clerk in respect of the right to fees and emoluments collected where the government is a party as well as in other cases.

The decrees of the circuit court of appeals are reversed, except the matter of costs, as to which the decree in No. 59 is affirmed.

Affirmed in part.
Reversed in part.

A true copy.

Test:

Clerk, Supreme Court, U. S.